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No. 85-2160

In the Supreme Court of the United States

OCTOBER TERM, 1986

TOWN OF NORWOOD, PETITIONER

v.

UNCOMPAHGRE VALLEY WATER USERS ASSOCIATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION FOR THE FEDERAL ENERGY REGULATORY COMMISSION AND FOR THE UNITED STATES AS AMICUS CURIAE

CHARLES FRIED
Solicitor General

F. HENRY HABICHT II
Assistant Attorney General

ROBERT L. KLARQUIST
ARTHUR E. GOWRAN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

CHRISTOPHER J. WARNER
Acting General Counsel

JEROME M. FEIT
Solicitor

JOSHUA Z. ROKACH
Attorney
Federal Energy Regulatory Commission
Washington, D.C. 20426

QUESTION PRESENTED

Whether the Act of June 22, 1938, ch. 577, 52 Stat. 941, gives the Secretary of the Interior exclusive authority to develop, or contract for the development and sale of, surplus power at the Uncompahgre Valley Reclamation Project, precluding the Federal Energy Regulatory Commission from exercising jurisdiction over the project under the Federal Power Act, 16 U.S.C. 791a *et seq.*

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 785 F.2d 269. The order of the court of appeals (Pet. App. 38a-39a) denying the petition for rehearing is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 5, 1986. A petition for rehearing was denied on April 7, 1986. The petition for a writ of certiorari was filed on June 27, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The Act of June 22, 1938, ch. 577, 52 Stat. 941, is reproduced at Pet. 4-5. The relevant provisions of the Federal Power Act, 16 U.S.C. 791a *et seq.*, are reproduced at Pet. 3-4.

INTEREST OF THE UNITED STATES

The Federal Energy Regulatory Commission (FERC) is a party respondent. The United States (on behalf of the Department of the Interior) participated below as amicus curiae. FERC and the United States (on behalf of the Department) disagree on the merits but agree that this case does not warrant review by this Court.

STATEMENT

1. The origins of this controversy lie in the filing, late in 1980 and early in 1981, of several competing applications with FERC for preliminary permits to develop hydroelectric projects at six sites within the Uncompahgre Valley Reclamation Project.[1] Section 4(e) of the Federal Power Act, 16 U.S.C. 797(e), authorizes FERC to issue licenses for hydroelectric projects using "the surplus water or water power from any Government dam." Before a license is issued, FERC may issue permits allowing potential developers to study sites before committing the time and substantial funds necessary to file a license application (16 U.S.C. 797(f)). The City of Montrose was among several applicants for preliminary permits and, because it was the only municipal applicant, FERC on October 26, 1981, issued preliminary permits to the City and denied the applications filed by others.[2] Approximately six months later, the City surrendered its permits (Pet. App. 6a). On the same day, the Uncompahgre Valley Water Users Association (UVWUA),

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[1]The Uncompahgre Reclamation Project was developed pursuant to the Reclamation Act of June 17, 1902, ch. 1093, 32 Stat. 388, 43 U.S.C. 371 *et seq.* The Secretary of the Interior authorized the Project in 1903 for the purpose of diverting water from the Gunnison River in the Uncompahgre Valley, which is located near the City of Montrose, Colorado. Pet. App. 4a.

[2]The Federal Power Act, § 7(a), 16 U.S.C. 800(a), provides that FERC must "give preference to applications [submitted] by States and municipalities, provided the plans * * * are * * * equally well adapted * * * to conserve and utilize in the public interest the water resources of the region."

a Colorado non-profit association which took over the maintenance and operation of the Uncompahgre Project in 1932 and served as managing agent for the City in the permit proceeding, and Montrose Partners (MP), a limited partnership formed under the laws of Massachusetts, filed license applications for the sites for which the City had just surrendered its permits (*id.* at 4a, 6a). Because the City's surrender of its permits and the subsequent filing by UVWUA and MP for licenses suggested the possibility of concerted action, FERC ordered the parties to respond to a rebuttable presumption that they had abused the municipal preference (*id.* at 6a-7a). FERC ultimately concluded that the City, UVWUA, and MP had abused the municipal preference and dismissed their license applications, suspended them for one year from applying to develop the sites, and reopened the bidding for the six sites (*id.* at 7a).

Upon reopening the bidding, FERC received approximately 19 applications for licenses or preliminary permits for power projects. Petitioner, the Town of Norwood, a small ranching community and municipality in Colorado, was the only municipal applicant and filed applications for five power project sites. In June 1984, while these applications were pending, UVWUA and MP petitioned the court of appeals for review of FERC's orders.

In May 1985, the Department of the Interior responded to FERC's request (pursuant to the 16 U.S.C. 797(c)) for comments on the pending applications. Interior asserted that under the Act of June 22, 1938, ch. 577, 52 Stat. 941, the Secretary of the Interior, acting through the Bureau of Reclamation, possesses exclusive authority to develop the power potential of the Uncompahgre Valley Project.[3] The

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[3]Interior's conclusion that it has exclusive authority under the 1938 statute to develop the power potential of the Uncompahgre Project was a new position. In several letters written between 1981 and 1985, Interior officials commented on various licensing applications pending

Secretary recommended that FERC reject, for lack of jurisdiction, all pending applications, as well as any future applications for power development within the Project. Pet. App. 7a.

2. The question of FERC's jurisdiction was raised in the court of appeals in oral argument on the UVWUA and MP petitions for review, and the court of appeals ordered supplemental briefs addressing the jurisdictional issue. In an order issued on August 9, 1985 (Pet. App. 18a-37a), and in its supplemental brief, FERC rejected Interior's claim of exclusive jurisdiction. FERC contended that it retained its authority over the Project under the Federal Power Act, as long as the Secretary of the Interior failed to take affirmative action to authorize power development on the Project (*id.* at 31a-32a). Because the Secretary had not taken such affirmative action here, FERC argued that the Act of June 2, 1938, did not divest it of jurisdiction over the Project (*id.* at 32a-33a). The court of appeals granted petitioner leave to intervene in the action for the limited purpose of addressing the jurisdictional issue. The United States, on behalf of the Department of the Interior, participated as amicus curiae and asserted the view that FERC lacked jurisdiction.

FERC based its contention that it retains jurisdiction on the Act of Apr. 16, 1906, ch. 1631, 34 Stat. 117, which governs reclamation projects in general (Pet. App. 25a-33a). FERC asserted that Section 5 of the 1906 statute and the 1938 statute are essentially the same (Pet. App. 32a). From this essential "sameness," FERC concluded that the 1938 statute should be construed in the same manner as the 1906 statute (*ibid.*). FERC noted that under the 1906 statute

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before FERC for power projects to be located within the Uncompahgre Project. In those letters, Interior either assumed FERC possessed jurisdiction, by stating that Interior did not object to FERC's licensing of the projects, or did not raise the jurisdictional issue at all.

an assertion of jurisdiction by the Secretary "must be preceded by a formal administra tive authorization and feasibility finding" (*id.* at 28a). FERC argued that the 1938 statute required the identical procedure (*id.* at 32a-33a). FERC further asserted that under this Court's decision in *Chapman* v. *FPC*, 345 U.S. 153, 170 (1953), in the absence of express congressional removal of FERC jurisdiction, FERC loses jurisdiction only if Congress takes over the project directly and authorizes its construction by the United States "or if Congress otherwise 'clearly manifest[s]' that the Commission's jurisdiction * * * is withdrawn" (Pet. App. 23a-24a). According to FERC, Congress took neither action in the 1938 statute, and, consequently, did not withdraw FERC's jurisdiction.

The court of appeals, adopting the contrary view urged by the United States on behalf of the Department of the Interior, vacated FERC's orders and dismissed UVWUA and MP's petitions for review on the ground that the Secretary has exclusive jurisdiction over the development and licensing of hydropower facilities at the Uncompahgre Project (Pet. App. 1a-17a). The court found (*id.* at 15a) nothing in the 1938 statute or its legislative history to support the view that the Secretary must take affirmative steps to oust FERC's claim of concurrent jurisdiction. The 1938 statute, the court concluded, takes precedence over the Federal Power Act's general grant of jurisdiction to FERC because the 1938 statute is a "specially-purposed enactment which contains provisions applicable only to a specific situation," in which the Secretary's role is "specific and circumscribed" (*id.* at 16a-17a). The court stated (*id.* at 17a) that the position urged by FERC would render the 1938 statute meaningless.

ARGUMENT

FERC and the United States (on behalf of the Department of the Interior) disagree as to the correctness of the decision of the court of appeals. Both agree, however, that

further review is unwarranted: regardless of the correctness of the decision below, it does not present a legal issue of sufficient importance to warrant this Court's review.

1. Petitioner claims that the decision of the court of appeals is incorrect and conflicts with this Court's decision in *Chapman* v. *FPC*, 345 U.S. 153 (1953), and the Fourth Circuit's decision in that case (see 191 F.2d 796 (1951)). In petitioner's view, the 1938 Act does not evince the clear congressional intent necessary to exclude FERC, which has general jurisdiction under the Federal Power Act over hydropower development, from exercising such jurisdiction over projects within the Uncompahgre Reclamation Project.

FERC agrees that the decision below is incorrect. FERC believes that the 1938 Act should be read against the backdrop of the Reclamation Act of 1906, under which the authority of the Secretary of the Interior over such projects depended on "a formal administrative authorization and feasibility finding," and that the correct way to harmonize the Federal Power Act and the 1938 Act is that the Secretary has jurisdiction if he asserts it but otherwise the Commission may act.[4] FERC also believes that this Court's decision in *Chapman* v. *FPC, supra*, requires more concrete evidence of congressional intent to divest FERC of jurisdiction than it believes is present here. (See page 5, *supra*.)

The United States (on behalf of the Department of the Interior) agrees with the court of appeals (Pet. App. 16a-17a) that where, as in this case, a specific statute (the 1938

[4]FERC rejects, however, much of petitioner's analysis. For instance, while petitioner argues that the legislative history of the Act of Apr. 16, 1906, ch. 1631, 34 Stat. 117, is of little relevance to this case (Pet. 11 n.6), FERC shares (Pet. App. 32a) the court of appeals' view (*id.* at 12a) that the 1938 Act should be construed in tandem with the 1906 Act. FERC also does not rely on the 1922 law heavily relied upon by petitioner (Pet. 16-19) and instead agrees with the United States that the 1938 Act, like the 1906 Act, extends to the leasing of power privileges (*id.* at 32a n.26). FERC's position is set out in full in its formal order (see Pet. App. 18a-37a).

Act) authorizes certain activity (the development of hydropower within the Uncompahgre Reclamation Project), a general statute (the Federal Power Act) should not (in the absence of other evidence of congressional intent) be read as superseding the specific enactment. See *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 153 (1976); *Morton* v. *Mancari*, 417 U.S. 535, 550-551 (1974). The United States (on behalf of the Department of the Interior) believes that providing FERC with concurrent jurisdiction over hydropower development within the reclamation area would frustrate the purposes of the 1938 Act. (FERC disagrees with this position and believes concurrent jurisdiction would serve appropriate regulatory purposes (see Pet. App. 31a-32a)).

The United States (on behalf of the Department of the Interior) also believes that this Court's decision in *Chapman* does not compel a different result than that reached by the court of appeals. In *Chapman*, this Court held that an act of Congress approving an Army Corps of Engineers river-basin development, which contemplated the construction of eleven hydropower projects, but authorized only two of the projects, did not divest FERC of jurisdiction over the other nine unauthorized sites. See 345 U.S. at 163-166. The United States believes that *Chapman*, which involved only congressional approval of a basin-wide development plan and authorization of two specific sites, is distinguishable from the present case because the 1938 Act specifically authorizes power development under the direction of the Secretary at one named federal reclamation project; no further congressional authorization is necessary.[5] (FERC disagrees with this reading of *Chapman* (see page 5, *supra*; Pet. App. 23a-35a)).

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[5]Petitioner also claims (Pet. 10-15) that the 1938 Act is insufficient, by itself, to oust FERC of concurrent jurisdiction because the Act reflects congressional intent to authorize the Secretary only to contract for the sale of surplus power and not final and definite congressional intent to authorize federal construction of hydropower projects. Although the

Finally, the United States believes that petitioner's reliance (Pet. 22) on several letters from subordinate Interior officials to FERC, which assume FERC jurisdiction, is misplaced. The United States believes that it is neither surprising nor determinative that subordinate Interior officials, commenting on the merits of applications to FERC, did not have occasion to consider the significance of the 1938 law to FERC's jurisdiction over the Uncompahgre Project. Certainly none of that prior correspondence reflected the Secretary's considered analysis of the issue.[6] And in any event, as the court of appeals said (Pet. App. 15a n.5), that earlier correspondence should not be dispositive, because " 'even consistent error is still error." ' *Ibid.*, quoting *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 678 n.5 (1954).[7]

United States agrees that the legislative history of the 1938 Act suggests that certain legislators anticipated that the project would be financed by non-federal monies (see 83 Cong. Rec. 2248 (1938) (Reps. Taylor and Rich)), the United States disagrees with the claim that Congress did not intend to authorize federal construction of hydropower development. The Act expressly provides that if water users do not pay interest on federal expenditures for hydropower development, net earnings are to be paid into the reclamation fund only after the water users have discharged their repayment obligations for "project construction charge indebtedness to the United States" (52 Stat. 941). The clear import of this provision is that Congress presumed federal construction of hydropower facilities.

[6]The Task Force Report quoted at length by petitioner (Pet. 21-22) does not represent a formal statement of the Secretary's legal views and does not support petitioner's position. The Report states only that Interior does not generally "assume" that it has exclusive jurisdiction over hydropower development (*id.* at 22), not that Interior might not possess such jurisdiction with respect to particular projects, such as the Uncompahgre.

[7]The Project Manager for the Bureau of Reclamation's Upper Colorado Region apparently advised UVWUA that Interior had no interest in developing power projects of less than a specified generating capacity, and even suggested that UVWUA file an application with FERC (see Pet. App. 5a). This advice was admittedly inconsistent with Interior's present view, but it is plainly not binding on the Secretary or determinative of the law. See *United States* v. *Locke*, No. 83-1394 (Apr. 1, 1985), slip op. 5 n.7.

2. Although FERC shares petitioner's view that the decision of the court of appeals is incorrect, FERC and the United States agree that the case does not merit further review. The case involves the relationship between the Federal Power Act and a specific federal statute that applies to only one federal reclamation project. The case therefore does not present an important issue of federal law. As petitioner concedes, the court of appeals' decision casts some doubt on, at most, one pre-existing permit and one pre-existing license issued by FERC (Pet. 9 nn.4 & 5).[8] The court of appeals' decision does not, moreover, necessarily invalidate these prior FERC actions, which were taken under at least a colorable claim of agency jurisdiction.

Finally, review is inappropriate because developments may soon effectively moot the controversy. Under petitioner's view, FERC possesses concurrent jurisdiction; according to FERC (Pet. App. 31a-32a), concurrent jurisdiction means that its jurisdiction continues until such time as the Secretary either begins actively to direct the Bureau of Reclamation to commence construction activities or the Secretary executes an appropriate lease agreement with private entities concerning power privileges. The Secretary is currently studying a proposal for power development (see 50 Fed. Reg. 50238 (1985)), and such a lease agreement may be entered into in the near future. Should that occur, FERC would lack jurisdiction at those sites under FERC's own view of the law and, presumably, under petitioner's as well.

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[8]The reference to 28 projects in the Department of the Interior's brief as amicus curiae in the court of appeals, cited by petitioner (Pet. 9), includes projects constructed under all reclamation laws, the vast majority of which contain statutory language different from that in the 1938 Act; only three statutes covering a total of three reclamation projects contain similar language.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

F. HENRY HABICHT II
Assistant Attorney General

ROBERT L. KLARQUIST
ARTHUR E. GOWRAN
Attorneys

CHRISTOPHER J. WARNER
Acting General Counsel
JEROME M. FEIT
Solicitor

JOSHUA Z. ROKACH
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